PENDAKWA RAYA

v.

ILAMARAN KANNIAPPAN

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[SEMAKAN JENAYAH SELANGOR NO. 43-7-91]
5 AUGUST 1991

CRIMINAL PROCEDURE: *Bail - Whether accused can be granted bail pending chemist report - Overriding statutory provisions - Interpretation - Criminal Procedure Code, s. 388 - Dangerous Drugs Act 1952, ss. 39B, 41(B) (1) (a), (b), (c).*

The accused was charged in the Magistrates Court on 13 April 1991, with trafficking in 261 gms of cannabis, an offence punishable under s. 39B of the DDA. The charge was read and explained to him but he was not asked to plead. When the accused was produced for the third time on 9 July 1991, his Counsel applied for bail, arguing that bail should not be withheld even in a case falling under s. 39B when the alleged weight of the drug had not been certified by the chemist. Further, as s. 39B (4) had not been complied with, the charge could not be properly explained to the accused. The defence contention was that only when the Government Chemist had confirmed the weight of the drugs, could the accused be said to be treated as guilty of an unbailable offence. The learned Magistrate granted bail and this was the appeal by the prosecution.

Held:

[1] When the proper procedure for arresting an accused found in possession of drugs has been complied with, the weight of the drugs has to be stated in the relevant police report. If the weight of the drugs so seized warrants a charge under s. 41(B) of the DDA, the accused is to be brought before the Court when the charge may be read and explained to him.

[2] Pending the chemist report and the obtaining of the said by the prosecutor, the accused may, by virtue of the proviso to subs. (3) of s. 39 B be remanded in custody. The Court must make an order to remand the accused person in accordance with the mandatory provisions of s. 41B of the DDA. The offence is unbailable.

[3] Section 388 of the Criminal Procedure Code does not override the provisions of s. 41B of the DDA 1952.

[4] As the Magistrate had no power to grant bail, the said order is to be set aside and the accused is to be produced from time to time before the Magistrate for the issuance of further remand orders pending the chemist report.

[5] The remedies for wrongful detention lie elsewhere and not under s. 388 of the CPC.

[Order accordingly.]

Cases referred to:
Loy Chin Hei v. PP [1982] 1 MLJ 31 ***(foll)***
Ho Huan Chong & Ors. v. PP [1980] 2 MLJ 289 ***(ovrd)***
PP v. Chew Siew Luan [1982] CLJ (Rep) 285 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 325, 388(1)
Dangerous Drugs Act 1952, ss. 39B(3), (4), 41B(1)

For the prosecution - Abdul Alim Abdullah
For the accused - T. Gunaselan, M/s. Wan Majid & Mano

JUDGMENT

Wan Yahya J:

On 9 July 1991, I set aside the order made by the Magistrate Kelang wherein she released the accused on bail of RM5,000 in two sureties and I directed that he be produced forthwith before this Court. On the same day, upon hearing the submission by the DPP and having afforded the accused the opportunity of addressing me, I made an order for him to be remanded until such time when his Counsel could be heard.

The accused was initially arrested on 5 April 1991. He was produced and charged in the Magistrate Court on 13 April 1991, for trafficking in 261 grams of cannabis, an offence punishable under s. 39(B) of the Dangerous Drug Act. The charge was read over and explained to him but he was not asked to plead. The accused was then remanded in custody and thereafter produced at monthly intervals, on 13 May 1991 and 10 June 1991 for mention before the learned Magistrate. This, I am given to understand, is the normal procedure adopted in the lower Court whilst awaiting for the confirmatory chemist report and consent of the public prosecutor which would in turn determine the appropriate Court in which the accused should be formally tried. When the accused was produced for the third time on 9 July 1991, his Counsel applied for bail and the learned Magistrate granted the accused bail presumably under s. 338(1) of the Criminal Procedure Code.

The argument presented by Counsel before the Magistrate's Court which is substantially the same as what was said here this morning is that bail should not be withheld even in a case falling under s. 39B when the alleged weight of the drug had not been certified by the Chemist. It was submitted that in such circumstances the charge could not be properly explained to the accused person and therefore s. 39B(4) has not been complied with. It is imperative to note that in the instant case the records show conclusively that the accused was charged with the offence of having possession of 261 gms of cannabis, and that the charge as framed had been read out and explained to him. There was nothing in the Magistrate's notes to indicate any perplexity in explaining the charge to the accused and neither was it suggested anywhere that the accused found the charge to be incomprehensible. Indeed I cannot perceive how 261 gms of cannabis can be read to mean anything more precisely than what it was intended to convey. Counsel's allegation about the difficulty or imprecisiveness of explaining the charge, to my mind, cannot be sustained.

With respect, I am unable to appreciate this line of argument that the mere prospect of an amendment of the weight of cannabis mentioned in the charge, could render the charge unexplainable, questionable or in any way defective.

When an offender like the accused in this case is found to have in his possession any dangerous drug and arrested, the drug so seized would be initially weighed by the officer affecting the seizure after which a police report stating the initial weight is usually lodged at the relevant police station. If the amount of drug so seized and weighed warrants a charge under s. 41B to be made, the accused is brought before the Court when the charge may be read and explained to him. He will not be asked to plead to the charge (see s. 39B(4) and neither will he be formally tried for the offence with which he had been tentatively charged until the consent by the Public Prosecutor as required under s. 39B(3) has been obtained. In the meantime the offending drugs should, as expeditiously as the circumstances of the case

permit, be delivered to the Chemist for analysis and final determination of its weight and contents. Pending the Chemist report and the consent from the Public Prosecutor, the accused may by virtue of the proviso to subs. (3) of s. 39B, be remanded in custody.

It is ostensible from the above that in any arrest made pursuant to s. 39B, all the prosecution need to do is to produce the arrested person before the Court and have the charge read out and explained to him. Once these procedures had been complied with the Court must make an order to remand the accused person in accordance with the mandatory provision of s. 4lB.

It is not open to the defence at this juncture on the mere hypothesis that the final amount as determined by the Chemist could turn up to be less than the amount with which the accused was initially charged, to move the Court into granting bail under s. 388(1) of the Criminal Procedure Code. It is illogical and invalid for the accused to challenge the prosecution into proving part of its case even before the commencement of the trial. The mandatory provision of subsection (1) of s. 41B makes the offence mentioned therein unbailable at the moment the accused is being charged and certainly not at a later stage when he is proved to have committed the offence specified in (a), (b) or (c) in that sub section.

I do not propose to risk repetition of what was said earlier in *Loy Chin Hei v. PP* [1982] 1 MLJ 31 wherein it was said that the absolutely restrictive term of s. 41B is to make the offence specified thereunder unabailable. This case was not canvassed before the Magistrate but it would appear that she was somehow persuaded by *Ho Huan Chong & Ors. v. PP* [1980] 2 MLJ 289, an authority cited by Counsel which was decided a year before *Loy Chin Hei's* case, to take this course of releasing the accused on bail. Counsel is no doubt entitled to cite one differing authority in preference to another by Courts of co-ordinate jurisdiction but when the same question of law has been settled by a judgment of a higher Court, then Counsel as an officer of the Court is duty bound to disclose that case to the Court, unless of course he is totally oblivious of the subsequent binding judgment.

At about the same time as the decision in *Loy Chin Hei's* case, the Public Prosecutor by way of Criminal reference in *PP v. Chew Siew Luan* [1982] CLJ (Rep) 285 obtained the decision from the Federal Court to this effect: that s. 388 of the Criminal Procedure Code does not override the provisions of s. 41B of the Dangerous Drugs Act 1952.

In the course of delivering his judgment Raja Azlan Shah (CJ) as he then was said:

> The Dangerous Drugs Act 1952, (Revised - 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia,* dangerous drugs, and to make special provisions relating to the jurisdiction of Courts in respect of offences thereunder and their trial, and for purposes connected therewith.
>
> In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s. 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act 1978 (Act A426) and became operative on 10 March 1978. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *PP v. Chu Beow Hin*).

Unless this Federal Court case is set aside by the Supreme Court, the Magistrate Court is bound by the principle of *stare decisis* to follow the authority laid down in *PP v. Chew Siew Luan* (*supra*) and no Court in Malaysia can, in purported exercise of its powers derived

from s. 388 of the Criminal Procedure Code, grant bail to any person charged with any of those offences specified in paras. (a), (b) or under the circumstances mentioned in para (c) of s. 41B(1) of the Dangerous Drug Act 1952.

For the above reason I would, in exercise of the revisionary powers under s. 325 of the Criminal Procedure Code, set aside the Magistrate's order on bail and order that the accused be produced from time to time before a Magistrate for the issuance of further remand orders.

I am not entirely oblivious to the disquieting prospect of an accused person being detained for an unlimited period under the proviso to s. 39B(3)(4) but in such an event the legal remedies will lie elsewhere for a wrongful detention and not under s. 388 of the Criminal Procedure Code.

I therefore confirm the previous order made by this Court on 9 July 1991 and direct that the accused to remain remanded pending the awaited analysis and determination of the weight of the cannabis by the government chemist.

Also found at [1992] 1 CLJ 492